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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.82 OF 1996

1. Sham Jairamdas Bajaj,
   Adult, Saideep, 17 Cuffe Parade,
   Mumbai 400 005.

2. Bharat Kumar Chunilal Shah,
   Adult, 600, Swami Vivekanand Road,
   Santacruz (E), Mumbai 400 054.

....Applicants.

Vs.

The State of Maharashtra.

...Respondent.

Mr.S.R.Chitnis, Sr. Advocate for the Petitioners.

Ms. Madhavi H. Mhatre, A.P.P. for the State.

CORAM : R.S. MOHITE,J.
DATED : 10/4/2006.

ORAL JUDGMENT ;

1. This is a revision filed by the applicant who are the original accused Nos. 4 and 5 impugning an order dated 8.12.1985 passed by the Special Judge, Greater Bombay in Special Case No.12/1986 rejecting an application for discharge and directing that the charges be framed against the present applicants and other accused for an offence punishable under Section 120B, 465, 466, 468, 471, 477A, 420, 417 read with 109 and 34 of the Indian Penal Code and under Section 5(2) read with 5(1)(d) of the Prevention of Corruption Act, 1947.

2. I have heard both the sides and perused the record. The original papers of investigation were produced before me by the A.P.P. and I have perused the documents which the prosecution relies

upon and which were collected in the course of the investigation.

3. The prosecution case is as under.

a) That a Solicitor by name Mr. D.G.Desai inherited a plot of land bearing Plot No.F/978 under a will of his wife dated 14.12.1971, which was probated on 1.4.1975.

b) That, on 3.9.1978 the said Mr. D.G.Desai executed a power of attorney in favour of the applicant No.1 Mr. Sham Bajaj. This power of attorney recorded that he had agreed to sell a plot of land admeasuring 773.42sq.mtrs.bearing new City Survey No.Plot F/978 and empowered applicant No.1 to do various things including preparation of plans, specifications, maps and designs and making applications to various authorities.

c) On 3.10.1978, Mr.D.G.Desai who was the sole beneficiary as well as executor of the will of his wife Kamala Desai entered into an written agreement with present applicant No.1 Shyam Bajaj purporting to sell the suit plot admeasauring 773.42sq.mtrs. bearing new city survey No.F-978 to him on the

terms and conditions mentioned in the said agreement. The agreement provided that the plot was being purchased by applicant No.1 together with the building standing thereon for a price of Rs.6,50,000/- of which an amount of Rs.65,000/- was the earnest money and the balance amount of Rs.5,85,000/- was to be paid in instalments. Out of Rs.5,85,000/- an amount upto Rs.2/- lacs, as per the demand of the vendor was payable on or before 31.12.1978 so as to enable the vendor Mr. Desai to purchase a flat of his choice. As regards the balance amount, it was provided that the vendor was to deliver vacant and peaceful possession of the ground floor of the building and the extended portion and also to produce income tax clearance certificate under Section 230A of the Income Tax Act on or before 31.12.1978 and thereupon sale was to be completed by the purchaser by paying balance amount of the purchase price remaining due and payable to the vendor. The purchaser was however, given an option to complete the conveyance on or before 31.12.1978. It was agreed that in the event of non production of the income tax clearance certificate by the vendor on or before 31.12.1978, purchaser was bound to pay to the vendor balance of the purchase price payable to the vendor against

the vacant possession of the premises mentioned in the agreement less Rs.75,000/-. It was agreed that this sum of Rs.75,000/- was to be deposited in M/s. Mahimtuara and Company Advocates, pending production of the income tax certificate under Section 230A. This amount of Rs.75,000/- was payable to the vendor on obtaining income tax clearance certificate. It was provided that the sale would take place latest on or before 25.2.1979.

d) The agreement further recorded that the first floor of the building was occupied by a tenant Mr. H. Merchant. The purchaser was given liberty to negotiate with the tenant, either to surrender vacant possession of the said premises occupied by him or provide him an alternate accommodation or to arrive at any other settlement. The purchaser was also given liberty to demolish the old construction and extension to it and to effect reconstruction of the said plot and upon effecting such reconstruction purchaser, his servants and agents were at liberty to sell the flats on ownership basis or on such other basis as the purchaser would deem fit and proper. It was further provided that on the execution of the

agreement, the vendor was required to execute a power of attorney in favour of the purchaser or his nominee or nominees authorising the purchaser or his nominees to apply for various permissions, submitting plans of the building intended to be constructed, taking necessary permission from the Bombay Municipal Corporation and to do all ancillary and incidental permissions. That an amount of Rs.65,000/- out of the total consideration of Rs.6,50,000/-was paid by the purchaser to the vendor Mr.D.G.Desai on the date of execution of the agreement i.e. on 3.10.1978.

e) Thereafter on 7.10.1978, the applicant No.1, signing for Mr.D.G.Desai addressed a notice under Section 377 of the B.M.C.Act to the Bombay Municipal Corporation indicating his intention to erect a building on CTS No.978. This notice which was filed and acknowledged by the Bombay Municipal Corporation on 9.10.1978 indicated that the applicant No.2 was being appointed as the person to supervise erection of the said building. Applicant No.2 Mr. B.G.Shah the Architect appointed also forwarded to the Bombay Municipal Corporation a letter of confirmation indicating that he had agreed to supervise the erection of the building as

per the plans submitted by applicant No.1 Mr. Sham Bajaj and this confirmation was an enclosure to the application signed by applicant No.1 Sham Bajaj for issuance of a commencement certificate under the Maharashtra Regional Town Planning Act. The construction plans which were annexures to this notice indicated the area of the plot to be 773.40sq.mtrs and one of the plans contained an duly signed architect's certificate as regards the areas of the plot in the following terms. It certified that the plot under reference was surveyed by me on 7.9.1978 and the dimensions of sites etc. of plot stated on plan are as measured on site and the area so worked out tallies with the area stated in document of ownership and to record.

f) On the same day i.e. on 7.10.1978, applicant No.1 Sham Bajaj acting as constituted attorney of Mr. Desai submitted another application for permission to develop the plot under Section 44/49 of the M.R.T.P.Act. In this application, area of the plot was shown as 925sq.yards which was equivalent to 773.42 sq.mtrs.

g) On 5.1.1979 Mr.D.G.Desai under his signature is said to have made on undated

application received by the Bombay Municipal Corporation under an acknowledgment dated 5.1.1979, to the City Survey Officer No.3 intimating that he had certain doubts about the boundary and area of plot No.F-978. He therefore, requested for a resurvey and demarcation of the aforesaid plot.

h) That on 8.1.1979 the original owner Mr. Desai executed several documents. On this date he received the full amount in lumpsum from the applicant No.1. He issued a receipt in favour of the applicant No.1 evidencing the handing over the vacant possession. He also executed separate document addressed to the tenant, attorning tenancy. One more document which was executed on 8.1.1979 was the letter by applicant No.1 to Mr. D.G. Desai in which it was stated that notwithstanding anything contained in the above agreement total consideration payable to Mr. D.G.Desai in respect of the aforesaid property would be calculated at the rate of Rs.700/- per sq.yards on the area of the plot as may be ascertained within a period of six months from 8.1.1979, time being of an essence. These documents dated 8.1.1979 find place in the file which has been seized by the Investigating Officer

from the custody of Applicant No.1 under a panchanama dated 22.10.1984. It may be mentioned that all these documents in the file said to have been executed by Mr.D.G.Desai are without signatures.

i) It is the prosecution case that on 16.1.1979 Plot No. 81 was measured by accused No.1 Suryakant Sawant who was a maintenance surveyor. The area in this measurement was determined to be 900.1-sq.mtrs. One Mr. G.R. Makhija was present at this measurement and he signed for Mr. D.G.Desai on the documents prepared on 6.1.1976.

j) The record indicates that immediately on 17.1.1979 vide his letter dated 16.1.1979, applicant No.2 i.e. Architect Mr.B.C.Shah submitted revised plans for the approval to the Asstt. Engineer, Building Proposal of the Bombay Municipal Corporation. The area on this revised plan was shown as 773.40sq.mtrs. and the plan contained a duly signed architect’s certificate in the following terms.

> "Certified that the plot under reference was surveyed on 7.9.1978 and the dimensions

> of sites etc. of plot stated on the plan are as measured on site and that area so worked out tallies with the area stated in document of ownership".

k) On 20.1.1979, the aforesaid Mr.G.R. Makhija addressed a letter to the City Survey office referring to the fact of area of the plot was found to be of 900.1 sq.mtrs. and recording a no objection for making a change in the survey record.

l) On 29.1.1979, Architect Mr. Shah addressed a letter to the Asstt.Engineer, Building Proposal, Bombay Municipal Corporation enclosing a set of revised plans and other documents. This letter was received and acknowledged by the Bombay Municipal Corporation on 30.1.1979. The enclosed plan indicated the area of the plot as 773.40sq.mtrs. and contained an architect’s certificate in the following terms:

> "Certified that the plot under reference was surveyed by me on 7.9.1978 and the dimensions of sides etc. of plot stated on plan are as per site and the area so worked

out tallies with the area stated in document of ownership".

m) On 6.2.1979 ULC permission of redevelopment was granted, on 15.2.1979 the Bombay Municipal Corporation granted the IOD as per the original plan and on 2.3.1979 they issued a commencement certificate. On 12.3.1979 the Architect Mr.Shah informed the Additional Collector about the demolition of the existing structures.

n) On 23.4.1979, the Architect Mr. Shah sent yet another amended set of plans to the Executive Engineer, Town Planning in respect of the proposed building.

o) On 19.5.1979 a set back area 71.91 sq.mtrs. was taken over by the Bombay Municipal Corporation, thus, further reducing available area of the plot for development.

p) On 31.5.1979 a letter is said to have been written by Mr. D.G.Desai to the Executive Engineer, Town Planning Office enclosing survey plan dated 16.1.1979. The said letter mentioned that in the survey conducted by the City Survey

Office on 16.1.1979 the area of the plot was found to be admeasuring 901.1 sq.mtrs. instead of 773.04 sq.mtrs. recorded previously. That the City Survey Department had issued a plan showing increased area and the process of correction of area in the property register card would take a considerable time of about a year. It recorded that the Bombay Municipal Corporation was insisting on a certificate revoking and approving the area and that if they were to wait for the property register card, the development of the plot would be held up. Request was therefore, made in the letter to issue necessary certificate as early as possible. This letter is acknowledged by one Mr.S.E.Wadiwale on 2.6.1979.

q) By way of response to the letter dated 31.5.1979 said to have been given by Mr.D.G.Desai, the Executive Engineer,Town Planning addressed a letter to him dated 23.8.1979 accepting the area of 900.1 sq.mtrs. certified by the city survey office in pursuance of the survey dated 16.1.1979. The letter further mentioned that the area had been incorporated in the scheme. Mr. Desai was called upon to submit amended property register card for the said property at the earliest. It appears that

on the same day i.e. on 23.8.1979 a person signing as "Ghanshyam" for D.G.Desai who according to the Advocate for the petitioner was Mr. G.R. Makhija addressed a letter to the City Survey Officer enclosing the letter dated 23.8.1979 issued by the Executive Engineer, Town Planning requesting the city survey officer to correct the property register card of city survey No.F/978 and issue a copy of the same at the earliest. The record indicates that thereupon city survey office mutated the property card on 24.8.1979.

r) On 4.9.1979, the Architect Mr. Shah submitted a letter dated 1.9.1979 addressed to the Executive Engineer, Building Proposal, Bombay Municipal Corporation epnclosing the set of amended plans. The amended plans were enclosed alongwith the letter and indicated the area of the plot as 900.1 sq.mtrs. This plan contained a duly signed architect certificate in the following terms:

> "Certified that the plot under reference was surveyed by me on 8.3.1979 and resurveyd on 16.8.1979 and the dimensions stated on plan are as per site measurement and the area so worked out tallies with the

recorrected area of city survey and TP Scheme area".

s) On 12.9.1979, Architect Mr. B.C.Shah addressed a further letter to the Asstt. Engineer, Building Proposal of the Bombay Municipal Corporation enclosing five sets of the new plans alongwith four cheques and requested for issuance of the IOD. It appears that by an endorsement dated 13.9.1979 the old approval was cancelled and new endorsement of approval was put upon the new plans on 14.9.1979. That, thereafter, the additional FSI sanctioned due to increase of area of the plot, came to be utilized by applicant No.1 Mr.Sham Bajaj and he sold out the constructed area on the plot for profit.

t) It appears that Anti Corruption Bureau. Social Unit (FSI Cell), Bombay received information that higher a FSI had been fraudulently obtained in respect of CTS No.F/978 of Bandra Division and P.S.I. Abdul Ismail was entrusted with the task of conducting an enquiry into the matter. The D.I.L.R. Cell attached to the Anti Corruption Bureau measured the said property under the direct supervision of Mr. Kulkarni and found that the

area of the plot was 797.25sq.mtrs. Accordingly, on 20.10.1984 a F.I.R. of Police Inspector Abdul Ismail came to be recorded and a crime was registered under C.R.No.41/1984 by the Anti Corruption Bureau for offence under Section 120B, 466, 467, 468, 471 and 420 of the Indian Penal Code read with 5(12)(d) and 5(2) of the Prevention of Corruption Act,1947. Consequently the investigation proceeded and the statement of number of witnesses were recorded. The investigation led to the filing of the charge sheet.

u) After the charge sheet was filed, the matter was committed to the court of Special Judge, Greater Bombay and the case against the various accused was numbered as Special Case No.12/1986. The present applicants preferred an application for discharge and the said discharge application came to be rejected by the impugned order dated 8.12.1995. The applicants thereafter filed the present revision application in this court on 8.3.1996 and obtained a stay pending final disposal. The trial has therefore, not proceeded for the period of almost 10 years.

4) In behalf of the applicants the arguments

made can be summarized as under:

i) That, the record indicated that the application for remeasurement was made only by the original owner Mr.D.G.Desai. He might have made an application out of a genuine doubt about the area particularly as the will under which he inherited the property indicated a larger area. That, there was nothing to show that the present applicants were in any way involved with making of the application for remeasurement of the plot or with subsequent events which occurred till the plot was actually measured on 16.1.1979.

ii) That, the remeasurement conducted by the Anti Corruption Bureau through the D.I.L.R. Mr.D.R.Kulkarni was incorrect.

iii) That, to bring home the charge of conspiracy, the existence of an unlawful agreement was a sine qua non. That, there was no material on record to indicate the existence of any such unlawful agreement. In this regard, reliance was placed upon the Judgment of the Apex Court in the case of **K.R. Purshothaman Vs. State of Kerala reported in (2005) 12 S.C.C. Page 631, the**

Judgment of the Apex Court in the case of State Vs. Nalini and others reported in (1999) 5 S.C.C. Page 253 and the Judgment of the Apex Court in the case of State of Maharashtra and others Vs. Som Nath Thapa and others reported in (1996) 4 S.C.C. 659.

iv) That, the sanction accorded in the case was improper and without proper application of mind.

v) That, while framing charge the court was required to evaluate the documents on record in order to find out whether all ingredients which constituted the offence were existing. That, this was not done by the trial court which passed the impugned order without application of mind and without proper reasoning to indicate and deal with the material indicating conspiracy and the offences with which it was proposed to charge the applicants. In this regard, reliance was placed upon the judgment of the Apex Court in the case of **State of M.P. Vs. Mohan Lal Soni reported in 2000 SAR (Crimes) 712 and the judgment of the Apex Court in the case of K. Ramakrishana Vs. State of Bihar reported in (2000) 8 S.C.C. 547.** A further proposition in this regard was that the test to determine a prima facie case was where the

materials placed before the court disclosed grave suspicion against the accused which has not been properly explained and that if two views were equally possible and the Judge was satisfied that evidence produced before him gave rise to some suspicion but not grave suspicion against the accused, he is fully within his right to discharge the accused. To buttress this proposition, reliance was placed upon the judgment of the Apex Court in the case of **Union of India Vs. Praful Kumar Samal and others reported in (1979) 3 S.C.C. Page 4.**

5) As against this, it was contended on behalf of the prosecution that there was sufficient material collected during the investigation to prove that there was a conspiracy hatched by Mr. Desai, present applicants and the Government officers who are other accused in this case. The revised plans submitted by the Architect indicated that he had himself conducted two measurements on 8.3.1979 and 16.8.1979 and both these measurements indicated the increased area. That, the present applicant No.1. Mr. Sham Bajaj was the only person who had benefited from the increase of area and the consequent increase of F.S.I. which he had

sold out for personal profit and he was thus only person to gain from the increased plot area That, the record indicated the active participation of both the applicants. It was contended that at this stage the measurement conducted by the D.I.L.R. attached to the Anti Corruption Bureau could not be said to be defective or incorrect.

6) I have heard both the sides at length. There is some substance in the grievance made by the applicants that the reasonings given in the impugned judgment and order does not deal with the materials to indicate the offence committed. Having heard the matter exhaustively and after perusing the entire record including voluminous documents and statements contained in the charge-sheet, I am not inclined to remand the matter after lapse of a period of 10 years as remand of the matter would entail further delay of the trial. I had also made it clear to the advocates that I will dispose of the matter on merits of the case.

7) As regards the various legal propositions made on behalf of the advocate for the applicants, I am in complete agreement with the propositions

laid down by various judgments of the Apex Court cited before me. Therefore, there is no need to refer any of the judgments cited, save and except to observe that though criminal conspiracy postulates the existence of an agreement, express or implied to commit an illegal act or legal act by illegal means, it is the unlawful agreement and not accomplishment which is the essence of the agreement of conspiracy. To establish the charge of criminal conspiracy, knowledge about the indulgence, either in illegal act or legal act by means is necessary. It is also well settled that there is seldom any direct evidence relating to conspiracy and often the existence and substance in the agreement to do the illegal act or legal act by legal means has to be gathered through circumstantial evidence.

8) In the present case, I am convinced that the circumstantial evidence prima facie indicates that this is a case where there is not mere suspicion but grave suspicion of the commission of offence by the present applicants in tandem with each other. These circumstances can be enumerated as under :

a) That, the applicant No.1 Mr. Sham Bajaj is a person who has ultimately benefited and profited by the utilization of the additional sanction of FSI which was the result of increase of the plot area due to the remeasurement of the plot which is alleged to be fraudulent.

b) That, to the naked eye the signatures of Mr. D.G.Desai on the power of attorney dated 3.9.1978, agreement dated 3.10.1978 and power of attorney dated 8.1.1979 differ with the signatures on the application made for measurement said to have been made by Mr.D.G.Desai on 5.1.1979 for resurvey and a Letter dated 31.5.1979 said to have been written by Mr.D.G.Desai to the Executive Engineer Town Planning requesting for issuance of necessary certificate revoking and approving the additional area of the plot. In this regard, I find the statement of Mr. Makhija identifying the signature of Mr.D.G.Desai on the application dated 5.1.1979 is highly suspicious and it is possible that Mr. Makhija may have to be roped as an accused under Section 319 of the Cr.P.C., if thought it proper by the trial court upon the evidence which is to be adduced in the case.

c) I find that on the plans submitted by the Architect i.e. applicant No.2 Mr.Shah alongwith his letter dated 1.9.1979 and 29.1.1979, the Architect had certified that the plot was measured by him on 7.9.1978 and the plot area of 773.42 sq.mtrs. was as measured at site. The same Architect while submitting revised plans alongwith his letter dated 1.9.1979 had certified that the area of the plot 900.1sq. mtrs. was as per the survey conducted by him on 8.3.1979 and a resurvey conducted by him on 16.3.1979 and that the redevelopment plan was as per the site measurement. It is prima facie clear that the different certificates issued by the Architect are at odds with each other and at least one of the two certificates would have to be false to the knowledge of the Architect concerned. There is also no evidence that any such survey stated to have been done by the Architect was actually done. It is highly probable that the Architect was acting on the instructions of the developer/builder i.e. applicant No.1 as applicant No.1 would clearly stand to benefit from such contradictory certificates issued by the Architect.

d) That, there exists a document on record

which indicates that on 8.1.1979 Mr.Desai was promised additional money at the rate of Rs.700/- per sq.yards of the area of the plot. This document prima facie indicates that there was a plan to get the plot remeasured at an early stage and that Mr.Desai was to be one of the beneficiary of this plan.

e) I am not inclined to accept at this stage that the measurement of the area by the office of the D.I.L.R. must be faulty and must be discarded.

9) The aforesaid several aspects of the case are such as to require evidence and it is not possible to come to the conclusion that this is a case where there is absolutely no material against the applicants or a case deserving discharge of the applicants without any trial.

10) In the result, revision application is rejected. It is however, made clear that the observations made in this order will not be used in the trial and the case will be decided solely on the basis of evidence adduced at the trial.

11) The Advocate for the applicants seeks stay

of further trial as he would like to approach the Apex Court. The trial may not proceed for a period of three weeks from today.

Certified copy expedited.

(R.S. MOHITE, J.)

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CORAM : R.S. MOHITE, J.
DATED : 10/4/2006.

ORAL JUDGMENT:

OPERATIVE ORDER

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